COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
DOCKET NOS. 2013-SC-000108/2013-SC-000778

MARY BANKER AND BRYAN M. CASSIS, ESQ., — **APPELLANTS/CROSS APPELLEES,**

v.

BRIEF FOR APPELLEE/CROSS-APPELLANT

UNIVERSITY OF LOUISVILLE ATHLETIC ASSOCIATION, INC., — **APPELLEE/CROSS-APPELLANT.**

*** *** ***

KY. COURT OF APPEALS NO. 2011-CA-001436

ON APPEAL FROM JEFFERSON CIRCUIT COURT,
CASE NO. 08-CI-8225; HON. CHARLES L. CUNNINGHAM, JUDGE.

Craig C. Dilger
Jeffrey A. Calabrese
Stoll Keenon Ogden PLLC
500 W. Jefferson Street, Suite 2000
Louisville, Kentucky 40202
(502) 333-6000
Counsel for Appellee/Cross-Appellant, Univ. of Louisville Athletic Association, Inc.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served this 10th day of June, 2014 via hand delivery upon Hon. Susan Stokely Clary, Clerk, Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601; and via U.S. mail, postage-prepaid, upon Hon. David Nicholson, Clerk, Jefferson Circuit Court, 2nd Floor, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202; Hon. Charles L. Cunningham, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202, Hon. Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Bryan M. Cassis, Esq., 1800 Kentucky Home Life Building, 239 S. Fifth Street, Louisville, Kentucky 40202.

Counsel for Appellee/Cross-Appellant

STATEMENT CONCERNING ORAL ARGUMENT

Appellee/Cross-Appellant agrees that oral argument is warranted.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Pursuant to CR 76.12(4)(d)(iii), Appellee/Cross-Appellant University of Louisville Athletic Association, Inc. ("ULAA") rejects Appellants/Cross-Appellees Mary Banker ("Banker") and Bryan M. Cassis, Esq. ("Cassis")'s statement of the case, and provides the following counterstatement of the relevant facts and procedural history.

A. Introduction.

Mary Banker was fired by ULAA after a single season as an assistant track and field coach because she was – by the unanimous accounts of her superiors, co-workers, and student-athletes – a subpar coach and recruiter at the NCAA Division I level. The evidence at trial on this point was overwhelming and unchallenged, and established that ULAA at the very least contemplated Banker's discharge well before her April 22, 2009 human resources complaint.

In light of relevant decisions of this Court and the Supreme Court of the United States, Banker's KRS § 344.280 retaliatory discharge claim should have been dismissed by the Jefferson Circuit Court on ULAA's motions for directed verdict and judgment notwithstanding the jury's verdict. On appeal, the Kentucky Court of Appeals properly applied this precedent and reversed the trial court's judgment in favor of Banker and her counsel, Cassis. Ultimately, Banker did not prevail on any of her fourteen counts against ULAA or its co-defendant, ULAA Athletic Director Tom Jurich ("Jurich") – she never proved retaliation, she never proved discrimination, and she never proved "hostile work environment" harassment. This Court should affirm the opinion of the Court of Appeals in full.

The Court of Appeals did not reach several other issues raised by ULAA in the alternative challenging the bases for the jury's awards of damages and the trial court's award of "prevailing plaintiff" attorney fees to Cassis. While ULAA believes these judgment-related matters will remain moot in light of the principal question of liability, this Court has granted discretionary review of these other issues, and will be addressed accordingly herein.

B. Pretrial Proceedings.

On August 8, 2008, Banker served ULAA and Jurich with her complaint. Both ULAA and Jurich were each named as defendants as to seven (7) different causes of action relating to Banker's employment with ULAA. After discovery, and after the Circuit Court decided various pretrial motions, trial began on September 13, 2010 with three KRS Chapter 344 claims surviving against ULAA (gender discrimination, "hostile work environment" based on gender, and retaliatory discharge) and one claim surviving against Jurich (retaliatory discharge).

C. Banker's Case in Chief.

Banker's case in chief at trial included her own testimony, as well as the testimony of her mother, Mary Louise Hilgers ("Hilgers"), Jurich, ULAA Executive Senior Associate Athletic Director Julie Hermann ("Hermann"), ULAA Head Men's and Women's Track and Field Coach Ron Mann ("Mann"), and University Affirmative Action/Sexual Harassment Officer Malinda Durbin ("Durbin"). The relevant facts presented through this testimony are as follows:

ULAA operates the University of Louisville's intercollegiate athletic programs at the NCAA Division I (scholarship) level. ULAA hired Banker as an assistant men's and

women's track and field coach in September 2007 pursuant to a written employment contract. (VR 9/14/10 at 1:10:11 (Employment Contract – Plaintiff's Exhibit 4)). Banker was hired specifically to recruit and coach the men's and women's multi-event (i.e., heptathlon and decathlon) athletes and serve as a recruiting coordinator for the overall, combined men's and women's track and field program. (VR 9/14/10 at 10:03:28).

The parties' contract, which had a term of approximately nine months (September 5, 2007 - June 30, 2008), gave ULAA the right to terminate Banker with or without cause on the Head Track and Field Coach's recommendation at any time upon thirty days written notice. (VR 9/14/10 at 1:10:11 (Employment Contract – Plaintiff's Exhibit 4 at preface, para.10)). The contract did not automatically renew upon the expiration of the term, though it had a non-renewal notification deadline of April 30, 2008. *Id.* at para. 23.

While Banker had been a track and field athlete and assistant coach at the NCAA Division III (non-scholarship) level, she had never competed or coached at the more competitive NCAA Division I (scholarship) level before joining ULAA. (VR 9/14/10 at 10:44:10). As in other Division I sports, evaluation of track and field coaches is based almost entirely on performance. As Mann testified, "our evaluations are the conference championships and the national championships." (VR 9/14/10 at 3:19:10). Banker herself agreed that in Division I, "you need to perform or you're out...you either do your job, you're a good coach, and you recruit good athletes, or you're not going to be there for very long." (VR 9/14/10 at 11:08:08). While Mann was initially optimistic about Banker, he soon began to have concerns about her performance. To address these concerns, Coach Mann met with Banker several times to discuss her lack of performance and to provide feedback and guidance as to things that had to change for her to become a

better coach. (VR 9/14/10 3:05:15 – 3:06:50; 3:19:32 – 3:19:50) Likewise, Hermann also had concerns about Banker's performance and her relationships with her colleagues and athletes. (VR 9/14/10 2:35:57 – 2:37:32).

On Thursday, April 16, 2008, Hermann and Mann met to discuss Mann's strategic plan for the men's and women's track teams. (VR 9/14/10 at 2:38:45 – 2:39:39) Banker's coaching and recruiting performance was part of this discussion, as well as Banker's effect on team and staff dynamics. *Id.* Hermann and Mann jointly decided at that meeting not to renew Banker's contract.[1] *Id.* ("We discussed it a little bit, and we decided, at that meeting, we knew right then and there we couldn't go forward with Mary in that [assistant coach] position."). Mann did not immediately notify Banker of this decision because he did not want to jeopardize team dynamics before the Big East conference championship meet in early May 2008. (VR 9/14/10 at 2:39:30 – 2:40:14).

On Wednesday, April 22, 2008, Banker went to the University of Louisville's Human Resources department and made an oral complaint to Durbin. (VR 9/14/10 at 10:17:29 – 10:18:48; 3:31:27 – 3:31:52; Plaintiff's Exhibit 10). The complaint included months-old allegations about comments she had overheard other assistant coaches make to athletes that had made her uncomfortable ("you run like a girl," "pull up your skirt," "stop being a Sally," etc.), complaints about recruiting tasks she subjectively felt were discriminatory, and wholly unsubstantiated rumors of past gender and racial

[1] Banker testified that she had no personal knowledge of when any decisions regarding her employment were made, or what was said about her in any ULAA meetings, including this April 16, 2008 meeting. (VR 9/14/10 11:27:30 – 11:27:45).

discrimination by Mann against former assistant track coaches.[2] *Id.* Banker claimed that she went to Durbin because previous informal efforts to address some of her concerns within ULAA had not reached an acceptable result. (VR 9/14/10 at 10:18:00 – 10:18:48). Durbin took written notes of Banker's complaint and told her the matter would be investigated.

After conferring with her supervisor, Durbin assigned the investigation of Banker's complaint to Hermann. (VR 9/14/10 at 3:36:00 – 3:36:55). Durbin made this assignment on the basis of her familiarity with Hermann, who had worked with the University's human resources department in the past. *Id.* Durbin testified that this kind of assignment to an uninvolved senior figure within the department at issue was a "normal process" for University human resources when an employee made an informal complaint. *Id.*; *see also* VR 9/14/10 at 1:41:15 (Hermann) ("The University's HR department is [ULAA's] HR department."). Hermann proceeded to investigate Banker's

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[2] Banker's discrimination and harassment claims were dismissed by the trial court and rejected by the jury, respectively, and have not been appealed. Nevertheless, Banker's brief to this Court misleadingly represents the "facts" of these claims as if she had prevailed. Placed in the proper context at trial, Banker's various allegations were properly viewed as innocuous workplace gripes that did not reflect disparate treatment. For example, Banker's allegation that she was asked to "help in the kitchen" and create party decorations (Banker Brief, p. 2) detailed tasks typical for all assistant coaches, male or female, and – especially given Banker's specific duty as overall recruiting coordinator – constituted no discrimination whatsoever. *See* VR 9/15/10 2:39:48 – 2:41:05, 4:03:48 – 4:05:03, 9/16/10 10:50:52 – 10:52:04 (testimony of other male, female assistants). Similarly, the motivational language Banker complained about to Hermann was never used towards her, and was often used by coaches *(including Banker!)* at the express request of the male and female athletes involved, *see, e.g.,* VR 9/16/10 8:48:13 – 8:51:24, 11:08:52 – 11:12:45 (testimony of other male, female assistants). As another example, Banker was jokingly encouraged by her co-workers to bring the ULAA compliance staff cookies because that was what her predecessor had done – and what other male assistant coaches had also done. *See* VR 9/15/10 2:51:22-2:52:22, 4:12:30 – 4:13:12 (male, female coaches had brought cookies in the past). A review of the trial recordings will demonstrate that Banker's other claims are equally specious.

complaint, interviewing the entire track and field staff (including Mann and Banker) as well as several former coaches, and concluded Banker's allegations were almost entirely without merit. (DV 9/14/10 at 3:36:57 – 3:37:48, 3:38:18 – 3:38:47, Plaintiff's Exhibit 8). Banker testified that during her interview – which occurred at the end of Hermann's investigation, several days after Banker's April 22, 2008 report – Hermann told her "you should've come to me with this, you shouldn't have gone to HR, I don't know how I'm going to restore trust in you amongst the staff now, I don't know how you can work downstairs anymore after this." (VR 9/14/10 at 10:19:17).

Hermann communicated her results in a May 6, 2008 email to Durbin's supervisor, Harvey Johnson. (VR 9/14/10 2:18:18 – 2:22:10, 1:51:50 – 1:52:48, Plaintiff's Exhibit 8). After making detailed findings, this email concluded as follows:

> Conclusion: Mary very much knows that her job is under review and feels she is under performing. This is true. She told me she went to HR to "cover herself." I asked her what this means and she said, she knows Ron [Mann] is disappointed in her and does not respect her work and it's made her paranoid. Throughout this process it has become clearer that Mary has struggled from the beginning to perform and out of frustration has confronted and verbally disrespected Head Coach Ron Mann repeatedly in the staff meetings out of frustration. This has caused their relationship to become very difficult and likely unrecoverable. This, combined with her lack of performance, will likely result in a non-renewal. I would recommend that Ron proceed to do so to the betterment of the program.

Id. Durbin testified that she found Hermann's investigation to have been timely conducted, and that she was satisfied with the rigorousness of the investigation, calling it "very thorough." (DV 9/14/10 at 3:37:48 – 3:38:18) Based on Hermann's findings, Durbin, an experienced human resources investigator, saw no reason to conduct any follow-up investigation.[3] (DV 9/14/10 at 3:39:00 – 3:39:10).

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[3] The foregoing trial testimony of Durbin and Hermann reveals Banker's claims (Banker Brief, p.4) that Hermann somehow "took over the investigation" in violation of University procedures as a naked misrepresentation of the record.

Immediately after the Big East conference championship meet ended, Mann's mother passed away, requiring his presence in Arizona to attend funeral services and address various family matters including dealing with his mother's estate; to make matters worse, Mann's father was on his deathbed at the time. (VR 9/14/10 3:24:45 – 3:26:00) When Mann returned to Louisville, he arranged to meet with Banker. On May 15, 2008, Mann notified Banker that ULAA had decided not to renew her contract, explaining that "it was not a good fit." (VR 9/14/10 at 10:19:58 – 10:20:20). Banker made no comments, and asked no questions, about the decision. (VR 9/14/10 at 3:26:01 - 18). The next day, May 16, 2008, Banker sent an email to Mann and Hermann protesting the late notice of the non-renewal decision and concluding that "[w]ith the timing of our meeting there is no other conclusion but that I am being let go in retaliation for the recent [HR] investigation." (VR 9/14/10 at 10:23:25). On May 28, 2008, Banker was provided with a memorandum explaining that ULAA would deem her contract to have renewed, but that it would immediately opt to terminate her contract on Mann's recommendation effective July 30, 2008. Thus, May 22, 2008 was Banker's last day working at ULAA, but she received her full salary and benefits through July 30, 2008.

While the parties' contract reflected her annualized salary ($37,500), Banker offered no evidence reflecting efforts to seek new employment. Banker testified that she did not try to look for replacement work for the following year (VR 9/14/10 10:21:30 - 10:22:15) - and, in fact, stated that she had rejected opportunities for new employment by refusing a recommendation letter from Mann, and by declining to pursue an employment opportunity proposed by a track coach at the University of Alabama at Birmingham. (VR 9/14/10 10:26:30).

Banker only offered her own testimony and Hilgers's testimony in support of the alleged emotional damages caused by her discharge. The entirety of Banker's relevant testimony is as follows:

Counsel: OK. Now, I assume losing a job was stressful?

Banker: Um, yes sir.

Counsel: How was it stressful?

Banker: Um, I lost a lot of weight because I wasn't able to eat, um, I just lost my appetite, um, and I just wasn't sleeping well at all, um, I just felt really embarrassed and depressed and just, it was just extremely stressful. I didn't have any money coming in besides unemployment benefits and lot of the coaching jobs at that point had been, people had already applied and I hadn't been looking for jobs at all.

(VR 9/14/10 10:26:32 - 10:28:03). Banker further admitted she had not sought any medical treatment or counseling, though her health insurance coverage lasted until her employment ended on July 30, 2008 - some two and a half months after she was notified about her non-renewal. *Id.* Hilgers, Banker's mother, testified that Banker's alleged stress and weight loss actually pre-dated her discharge by six months:

Counsel: Can you describe what you saw insofar as Mary's demeanor and kind of how Mary was when she first got the job at UofL?

Hilgers: We had talked about, um, her going [to Louisville] and I gave her my blessings on it. I said I thought that would really be great for her to do because she had come so far as a coach and she was, to me, she was a brilliant coach, I mean she instilled a lot of morals and everything in her athletes. She was like their mother away from home taking care of them academically and sports-wise. And I just, I gave her my blessings because I thought it was a step up for her and during, around I want to say December 2007 I saw, she wasn't talking to me the way she normally does, phone conversations and/or when I saw her. She was stressed and then later on she started losing weight when I saw her and she just got more stressed along the way.

Counsel: And then at some point did Mary inform you that she'd been fired from UofL?

Hilgers: Yes, she did.

Counsel: Can you give us a little snapshot of how, what you saw, how that affected Mary?

Hilgers: It was devastating. It was totally devastating because when she does her job she, I mean, her whole body, her whole life is surrounded by, she loves being a coach and her athletes and it was very devastating.

VR 9/14/10 11:33:34 - 11:36:02 (underline added).

At the close of Banker's proof, ULAA moved for a directed verdict as to her retaliatory discharge claim for failure to establish the *prima facie* element of a "causal connection," arguing that the undisputed proof reflected that ULAA had decided not to renew Banker's contract on April 16, 2008 - six days before Banker's statutorily protected conduct (the April 22, 2008 human resources complaint). The Circuit Court denied ULAA's motion, referring only to Plaintiff's Exhibit 8, the May 6, 2008 email from Hermann to University human resources personnel. In explaining its decision, however, the Circuit Court recognized that, at the very least, Hermann's email established that she and Mann had strongly considered Banker's non-renewal on April 16, 2008:

> Have you seen Plaintiff's Exhibit 8? Where it says, where Ms. Hermann says...(reading document)..."Mary very much knows her job is under review"; where it says "this has caused her relationship to become very difficult and likely unrecoverable"? "Will likely result in non-renewal"? It doesn't say that we made a decision three weeks ago to can her, or to non-renew her, it says "it's trending that way, it's looking like that, it's likely," it doesn't say the decision's been made. So - you (counsel) say that [the non-renewal decision was made on April 16, 2008], but I can't sit here and say that the jury would have to conclude that that's true. [...] I'm saying because of this exhibit, it's not undisputed.

(VR 9/14/10 at 3:57:35 – 3:58:29). The Circuit Court also denied ULAA's motion for directed verdict as to Banker's "hostile work environment" claim. (VR 9/14/10 at 3:52:25 – 31). The Court did, however, grant a directed verdict in favor of ULAA as to Banker's gender discrimination claim (VR 9/14/10 at 3:55:05 – 13), and in favor of Jurich as to

Banker's retaliatory discharge claim. (VR 9/14/10 at 4:10:40 - 45). As a result of these rulings, Jurich was dismissed from the case entirely, and the case proceeded only as to the "hostile work environment" and retaliatory discharge claims against ULAA.

D. ULAA's Case in Chief.

ULAA's case in chief at trial included the testimony of Hermann, Mann, other current and former assistant track coaches, and one of Banker's former athletes. This testimony detailed the grounds supporting Mann's decision not to renew Banker's contract for poor performance. For example:

- Banker "signed" only one student-athlete to compete in the multi-events for ULAA, Megan Schubert, and that student-athlete never competed in the multievents for ULAA. Multi-event athlete recruiting was Banker's responsibility. (VR 9/15/10 at 2:57:34 – 2:58:30, 3:09:02 – 3:09:49; 9/16/10 at 11:58:57 – 11:59:30). At the time of trial, ULAA had no multievent athletes at all, due to Banker's failure to recruit or retain athletes. (VR 9/15/10 3:09:33 – 3:10:07).

- Banker made far fewer recruiting phone calls than that required to develop an acceptable number of suitable ULAA recruits. (VR 9/15/10 at 11:10:05-06; 4:02:53 – 4:03:48; 4:11:07 – 4:12:30; 9/16/10 at 10:47:24 – 41, 11:43:45 – 11:44:19). Mann had to intervene in Banker's recruiting mailing efforts to ensure the correct mailings were sent in a timely fashion. (VR 9/16/10 11:36:46 – 11:39:08).

- Banker disagreed with ULAA's "combined team" approach to men's and women's track recruiting, preferring only to send female recruits information about the women's team (and vice versa). (VR 9/15/10 at 10:13:56 – 10:16:30). Likewise, Banker

claimed that she could not "sell" ULAA's track program. (VR 9/15/10 at 10:16:27-33, 10:46:20 – 10:47:02).

- On virtually every objective measure (time, distance, point total, etc.), each of the four athletes Banker started the season with regressed. (VR 9/15/10 2:56:34-2:57:34; 9/16/10 at 11:44:24 – 11:46:00, 12:00:14 – 12:04:16, 3:02:31 – 3:05:02). One of Banker's four multievent athletes was so frustrated with Banker that he transferred to another school. (VR 9/16/10 at 3:03:31 – 3:03:41). Another quit the multievents altogether and began competing in the pole vault exclusively. *Id.*

- Senior multievent athlete Christine Krellwitz later asked for a conference with Hermann, during which she called Banker the worst coach she had ever had, and begged Hermann to replace her, so the next year's incoming freshmen wouldn't have their athletic careers ruined. (VR 9/15/10 10:43:02 – 10:44:15). Hermann, a veteran athletics administrator, testified that she had never had a student-athlete make such an appeal before. *Id.*

- Banker was often rude and confrontational with Head Coach Ron Mann during weekly staff meetings. (VR 9/15/10 at 10:13:56 – 10:16:30, 10:27:36 – 10:39:04; 9/16/10 at 9:00:35 – 9:01:10, 11:49:17 – 11:50:27, 12:18:35 – 12:19:25, 2:58:58 – 3:00:40).

- Banker had limited technical knowledge about the events in which her multi-events athletes competed. (VR 9/16/10 at 8:58:22 – 8:59:33).

- Banker failed to draft and deliver the multievent athletes' "annual plan" to the ULAA strength and conditioning staff on time; in fact, it was not delivered until February 2008, five months after she first came to campus. (VR 9/16/10 at 9:43:50 –

9:45:22, 11:46:00 – 11:47:20). Mann and the strength and conditioning staff had expected this plan in the first few months of her employment, September or early October 2007. (VR 9/16/10 at 12:40:30 – 12:41:23).

E. The Proof Closes.

Banker chose not to offer any rebuttal testimony, and the proof closed. ULAA again moved for a directed verdict as to Banker's retaliatory discharge claim, arguing that Banker had failed to submit sufficient evidence for the jury to find ULAA's legitimate non-retaliatory reason for her discharge was a pretext. Additionally, ULAA moved for a directed verdict as to any award of lost wages, as Banker had failed to offer any proof that she had tried to mitigate her damages. The Circuit Court denied both motions.

F. Jury Verdict and Post-Trial Activity.

After deliberating, the jury returned a divided verdict, finding for ULAA as to Banker's hostile work environment claim, but finding for Banker as to her retaliatory discharge claim. The jury awarded Banker $71,875 in lost wages (the maximum permitted by the Circuit Court's instructions) and $300,000 in emotional distress damages.

After trial, the Circuit Court issued "interim findings" detailing the jury's verdict, and asked the parties to submit evidence of Banker's post-discharge earnings so that the Court could reduce the jury's award of lost wages. ULAA moved to amend these findings to strike the jury's award of lost wages, and objected to the Court's consideration of matters committed to the province of the jury. The Circuit Court denied ULAA's motion to strike the jury's lost wages award, but agreed that the Court could not disrupt the jury's findings post-trial.

On October 5, 2010, Banker submitted a motion for an award of reasonable attorney fees pursuant to KRS § 337.450. Banker's supporting memorandum suggested that this award be premised on a $186,656.25 "lodestar" calculated by multiplying Cassis's suggested hourly rate ($275 per hour) times the number of hours Cassis claimed to have worked on the case (678.75 hours). As to the latter figure, this memorandum stated:

> With respect to the specific time entries and the number of hours recorded, it must be noted that the time entries of Plaintiff's counsel are not after-the-fact recollections or general estimates of time spent working on the case. To the contrary, for over two years the Plaintiff's counsel has been meticulously documenting all time spent working on this case and the time entries are date and time-specific down to .25 hourly increments. These time entries are detailed as to subject matter and they evidence the actual time and number of hours spent working on this case.

(Memo. in Support of Motion for Atty. Fees at 5). The motion was supported only by a brief affidavit from Cassis and a Microsoft Word document containing a list of time entries.

In response to post-trial discovery requests on the "meticulous documentation" supporting her fee motion, however, Banker conceded that, in fact, the entries submitted to the Circuit Court were "after-the-fact recollections" of her counsel's time:

> The Time Entries document [submitted to the Court] was created on October 1, 2010, following the trial and in preparation for submission to the Court in support of Plaintiff's Motion for Attorney Fees. The Time Entries document incorporated draft time entry notations contemporaneously made from April of 2008 to November of 2009. These draft time notations were not complete or final time entry summaries and they do not reflect the total time incurred in prosecuting the Banker case. Following the conclusion of the Banker trial, the draft notations were incorporated into final and complete Time Entries along with revised entry descriptions and additional time based on a complete review of the pleadings, client correspondence, motion-hour and hearing dates, legal research files, telephone calls and attorney discussions.

(ULAA's Response to Motion for Fees, Ex. E at 1-2). A comparison of the draft time entries produced in post-trial discovery with Cassis' final time entries submitted to the Circuit Court, moreover, reflected considerable inflation. From January 2008 to mid-November 2009, Cassis' draft entries reflected 182.3 hours of work, yet his final time entries detailed 300.3 hours of work – an upward "revision" of 118 hours.[4] *Id.* at Ex. B (side-by-side comparison of "draft" and "final" entries). From mid-November 2009 to October 2010 - a critically important period of time that included dispositive motion practice, discovery motion practice, mediation, pretrial preparation, and trial – there were no draft entries at all; thus, all of Cassis' final entries for this time period had been reconstructed post-verdict. The records, moreover, reflected serious billing inefficiencies, and sought fees incurred litigating discovery disputes for which Banker was solely responsible.

ULAA identified these and other material deficiencies in its response, and argued that the Circuit Court apply a fifty percent reduction to Banker's suggested 678.75 "lodestar" hours, resulting in a revised amount of 339.375 hours. ULAA also argued that the Circuit Court revise the final "lodestar" calculation downward thirty-three percent (33%) to account for Banker's lack of success as to all of her seven claims against Jurich, and six out of her seven claims against ULAA. Banker filed no reply in support of her motion. On February 15, 2011, the Circuit Court awarded Cassis $149,325 in fees. This award consisted of an unadjusted "lodestar" calculated by

[4] Even these "draft" entries, moreover, suggested grossly inflated hours. For example, these entries reflect Cassis (1) recorded 3,935.5 "billable" hours in calendar year 2008; (2) recorded 20 hours a day or more on thirty five separate days, including several instances on consecutive days; (3) recorded over 24 hours in a single day; and (4) averaged 12.03 hours per day for every work day between January 1, 2008 and November 14, 2009. *See* Response to Motion for Atty. Fees at 10-11, Ex. C, F.

multiplying a $220 hourly rate by 678.75 hours – the entire amount of time claimed. The Circuit Court's opinion reflected no analysis of Cassis's claimed hours to determine whether, in fact, that time had actually been spent prosecuting Banker's claims.

On May 18, 2011, the Circuit Court entered its final judgment, which incorporated by reference all of its prior post-trial rulings. On May 31, 2011, ULAA filed a motion for judgment notwithstanding the verdict or a new trial, which was denied by the Circuit Court on July 12, 2011. On August 8, 2011, ULAA timely filed its notice of appeal, which expressly named both Banker and Cassis as appellees.

G. The Court of Appeals Reverses and Remands the Case for Dismissal.

On February 1, 2013, the Kentucky Court of Appeals entered an opinion reversing the judgment and orders of the trial court and remanding the case to be dismissed. The Court of Appeals, relying on the burden-shifting framework first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973), and used by this Court in the context of KRS § 344.280 claims in *Ky. Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003), first held that Banker had failed to prove a prima facie case of retaliatory discharge. Specifically, the Court of Appeals found that "the undisputed proof introduced at trial establishe[d] that Ms. Hermann and Coach Mann met to discuss Coach Mann's strategic plan for the year on April 16, 2008, approximately one week prior to Banker's HR complaint on April 22, 2008...and...decided that day not to go forward with Banker's contract for the next season[.]" The Court concluded that because ULAA had at least contemplated discharging Banker before the single alleged protected activity before the Court – Banker's April 22, 2008 human resources complaint – Banker could not establish the critical "causal connection" element of her *prima facie* case pursuant to the unanimous, and universally accepted, opinion of the Supreme Court

of the United States in *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001). Accordingly, reversal and dismissal were required on this basis.

Even if Banker had proven a prima facie case of retaliatory discharge, however, the Court of Appeals held in the alternative that reversal and dismissal were necessary because Banker had "failed to present any evidence at trial that ULAA's stated reasons for its decision to discharge Banker were a pretext for unlawful retaliation," as required by *McDonnell-Douglas*, *McCullough*, and a host of other federal and Kentucky cases.

Having held for ULAA on the ultimate question of liability, the Court of Appeals recognized ULAA's remaining issues were moot, but specifically held that the trial court's award of attorney fees to Cassis was also reversed.

In a one-line dissent, one judge of the Court of Appeals stated that he "would affirm on the jury issue but reverse on the salary issue."

Banker and Cassis timely filed a motion for discretionary review of the Court of Appeals's opinion, which was granted on November 13, 2013. ULAA timely filed a cross-motion for discretionary review of its other appellate issues not reached by the Court of Appeals, which was granted on February 12, 2014.

ARGUMENT

I. INTRODUCTION.

The Court of Appeals's opinion turns on a straightforward application of the classic *McDonnell-Douglas* burden shifting framework to the facts of Banker's KRS § 344.280 retaliatory discharge claim and should be affirmed. The undisputed evidence at trial showed that Banker was an abysmal coach and recruiter, and that ULAA officials had, at the very least, contemplated discharging Banker before she filed a bogus human

resources complaint to "cover herself" eight days before her contract's non-renewal deadline. On these facts, Banker's claims should never have been submitted to the jury as a matter of law. The Court of Appeals correctly reversed the judgment of the trial court.

The normative law governing this case is the unanimous Supreme Court decision in *Clark Co. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001), which held no evidence of causation exists where an employer shows it was at least contemplating an adverse employment action before an employee engages in statutorily protected activity. The Court of Appeals correctly determined that, without proof of a causal connection between her April 22, 2008 complaint and her discharge, Banker could not establish a prima facie case of retaliation. Here, Banker does not just fail to address *Breeden*; she does not even cite it, choosing instead to reply upon a "shotgun" argument of irrelevant and unproven allegations that do not establish causation.

The Court of Appeals also correctly held, in the alternative, that Banker had failed to submit any evidence showing that ULAA's legitimate non-retaliatory reasons supporting discharge were a pretext for unlawful retaliation. Banker still cannot point to any such evidence here, insisting instead (for the first time) upon an erroneous legal standard that would sharply diverge from the federal anti-retaliation standard and impermissibly shift the ultimate burden of proof in KRS § 344.280 cases to the defendant employer. Banker, furthermore, relies on several arguments and theories of liability in this Court that she did not advance - and even contradicted - in the lower courts. This Court should affirm the sound reasoning, and result, of the Court of Appeals.

II. STANDARD OF REVIEW.

When determining whether a trial court erred in denying a motion for directed verdict or judgment notwithstanding the verdict, the non-moving party's evidence is taken as true and the non-moving party is entitled to all reasonable inferences that may be made from the evidence. *McCullough*, 123 S.W.3d at 134 (citation omitted). Questions of law are reviewed *de novo*. *Reis v. Campbell Cty. Bd. of Educ.*, 938 S.W.2d 880, 885-86 (Ky. 1996).

III. THE COURT OF APPEALS USED THE CORRECT LEGAL FRAMEWORK TO EVALUATE BANKER'S KRS § 344.280 CLAIM.

A. The Court of Appeals Correctly Relied Upon Well-Established Legal Standards Embraced by All Parties in this Case.

KRS § 344.280(1) makes it unlawful for one or more persons "to retaliate or discriminate in any manner against a person...because he has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under [the Kentucky Civil Rights Act]." An individual who believes he or she has suffered such retaliation may pursue a civil cause of action in circuit court to seek redress for any resulting injuries. KRS § 344.450.

When, as here, a plaintiff brings a KRS § 344.280 retaliation claim that relies upon circumstantial evidence, Kentucky courts apply the familiar three-step burden-shifting process, first used in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), to analyze the sufficiency of the proof submitted in support of that claim:

> A claim for unlawful retaliation requires the plaintiff to first establish a prima facie case of retaliation, which consists of showing that "(1) she engaged in a protected activity, (2) she was disadvantaged by an act of her employer, and (3) there was a causal connection between the activity engaged in and the [defendant] employer's act. In a case where there is no direct evidence of retaliation, as is the case here, the burden of production and persuasion follows the familiar *McDonnell Douglas* [*v. Green*] framework. Under this framework, after the

> plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the defendant to show a non-retaliatory reason for the adverse employment decision that disadvantaged the plaintiff. After the defendant has met this burden, the *McDonnell Douglas* framework is no longer relevant. [...]
>
> At this point, the case then proceeds with the plaintiff having to meet her burden of persuading the trier of fact by a preponderance of the evidence that the defendant unlawfully retaliated against her. To meet her burden of persuasion, the plaintiff must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for retaliation.

McCullough, 123 S.W.3d at 133-134 (citations and quotations omitted) (underline added) (applying framework to evaluate trial court's denial of KRS § 344.280 directed verdict motion); *see also Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 132 S.W.3d 790, 801-805 (Ky. 2004) (same). Ultimately, the burden of proof and persuasion rests with the plaintiff, who must not only produce evidence that the defendant employer's stated reason for acting is a pretext, but must also produce sufficient evidence that he or she was the victim of intentional retaliation. *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.2d 492, 497-500 (Ky. 2005) (applying framework to evaluate whether KRS Chapter 344 jury verdict should be upheld).

The Court of Appeals properly relied upon this *McDonnell-Douglas* framework and its various elements. *Banker v. Univ. of Louisville Athletic Assoc., Inc.*, 2013 Ky. App. Unpub. LEXIS 987 at *9-12 (Ky. App., Feb. 1, 2013) (citing, *inter alia*, *McCullough* and *Brooks*). This was not unexpected, as both Banker and ULAA had embraced these basic legal standards before both the trial court and the Court of Appeals. In her response to ULAA's motion for summary judgment, Banker conceded she had no direct evidence of retaliation, and relied upon cases employing variants of the *McDonnell-Douglas* test. **Appx. A,** Banker Resp. to ULAA M. Summ. J. at 15-17. Similarly, in her brief to the Court of Appeals, Banker again referenced circumstantial

evidence of retaliation and specifically praised the trial court's use of "the traditional *McDonnell Douglas* burden-shifting framework" as applied by this Court in *Williams*, *supra*. **Appx. B,** Banker Court of App. Brief at 14-16. Thus, at least when the end result was favorable, Banker fully supported the legal framework properly used by the Court of Appeals.

B. This Court Should Reject Banker's Erroneous and Untimely Proposed Legal Standards.

Banker's affinity for the *McDonnell Douglas* test came to a sudden halt, however, the moment it was correctly applied by the Court of Appeals to reverse her unsupported jury verdict and attorney fee award. In her motion for discretionary review, and again in her brief to this Court, Banker contends that: (1) she in fact *does have* direct evidence of retaliation that the Court of Appeals failed to recognize; (2) the *McDonnell Douglas* framework used by the Circuit Court and Court of Appeals *was* improper; and (3) the Court of Appeals has effectively established "new legal standards [that] run blatantly contrary to the provisions of KRS § 344.280 and existing Kentucky case law." Banker Brief at 11. As a result of these alleged errors, Banker breathlessly warns that the Court of Appeals's decision, if permitted to stand, "will effectively operate as a new and impossible bar to employees attempting to prove unlawful retaliation." *Id.* Each of Banker's new-found arguments is meritless, however, and should not dissuade this Court from affirming the Court of Appeals's opinion.

1. There is no direct evidence of retaliation.

Banker has not produced anything resembling "direct evidence" of retaliation to this Court. "Direct evidence is evidence, which if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption. Typically,

this type of smoking-gun evidence will consist of written or oral statements, most likely made by the decision-maker responsible for the adverse action against the plaintiff." *McCullough*, 123 S.W.3d at 135.

After conceding she had no direct evidence before the Circuit Court and only barely addressing the subject at the Court of Appeals, Banker now specifically argues Hermann's post-investigation statements to Banker that (1) "you should have come to me," (2) "I don't know how I'm going to restore trust in you amongst the staff now," (3) "I don't know how you're going to work downstairs after this," and (4) "you should not have gone to HR" all constitute this dispositive, "smoking gun"-type proof. Banker Brief at 15-16. *But see* Banker's Court of Appeals Brief at 15 (citing cases permitting use of circumstantial evidence to prove case in lieu of rare "smoking gun" direct evidence).

None of these statements from Hermann, however, prove the ultimate fact in question, *i.e.*, whether Banker was fired because she filed a human resources complaint – without any additional inferences or presumptions. Only one statement even references Banker's employment ("I don't know how you're going to work downstairs after this"), and the Court would still have to unreasonably presume Hermann was referring to terminating Banker, and not simply making a practical observation that it might be difficult for an employee who lodged baseless complaints of discrimination and bigotry against her co-workers to continue working productively with those individuals. The ultimate decisionmaker, furthermore, was Ron Mann, not Hermann.[5] *See, e.g.,*

[5] Banker's adoption of Hermann as the responsible decisionmaker is especially disingenuous given Banker's previous legal position, held through the end of her case at trial, that Tom Jurich was actually the ultimate decisionmaker. In fact, Banker's seven claims against Jurich in his individual capacity were premised on this purported status.

Employment Contract (Plaintiff's Exhibit 4 at preface, para. 10) (contract terminated on recommendation of Head Track and Field Coach).

In any event, because Banker did not argue that these statements constituted direct evidence to the trial court or Court of Appeals, she cannot do so for the first time here. *See, e.g., Durham v. Peabody Coal Co.*, 272 S.W.3d 192, 194 n.2 (Ky. 2008), *Hyatt v. Comm.*, 72 S.W.3d 566, 575 (Ky. 2002) (arguments not raised to Court of Appeals not preserved for Supreme Court review); *TECO Mech. Contr., Inc. v. Comm.*, 366 S.W.3d 386, 397 n.15 (Ky. 2012), *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009) (appellate court lacks authority to review issues not raised in or decided by trial court). The Court of Appeals properly evaluated Banker's KRS § 344.280 claim as one relying entirely upon circumstantial evidence.

2. The *McDonnell-Douglas* Framework Is Appropriate for Evaluating a KRS § 344.280 Retaliation Claim Post-Trial.

Next, Banker contends – despite her previously held position – that "the Court of Appeals further erred by even deciding the case within the framework of the *McDonnell Douglas* burden-shifting analysis," arguing that framework is now an "antiquated summary judgment analysis that should give way to a more practical and common sense analysis[.]" Banker does not cite a single case in support of this about-face, and does not propose an alternative standard or framework for the Court to use – and with little wonder, as no such authority or framework exists in Kentucky. This Court has repeatedly applied the *McDonnell Douglas* analysis to evaluate the evidentiary support for a Kentucky Civil Rights Act ("KCRA") claim post-trial. *See, e.g., McCullough*, 123 S.W.3d at 133-134 (applying *McDonnell Douglas* analysis to determine whether plaintiff produced sufficient evidence to survive a motion for a directed verdict on KCRA

retaliation claim); *Brooks,* 132 S.W.3d at 802-805 (same); *Williams*, 184 S.W.3d at 494-500 (applying *McDonnell Douglas* analysis to determine whether plaintiff produced sufficient evidence to uphold jury verdict for age discrimination). Banker, moreover, cannot argue to the contrary in this Court, as she never did so in the trial court or the Court of Appeals. *See* Argument, Section III.B.1, *supra* (citing cases).

3. *Zarebidaki* is Not a Kentucky Civil Rights Act Case and Does Not Accurately Describe the Plaintiff's Burden in KRS § 344.280 Cases.

Banker's new-found reliance on *First Property Mgmt. Corp. v. Zarebidaki*, 867 S.W.2d 185 (Ky. 1993), moreover, is completely misplaced. *See* Banker Brief at 10. Banker's brief to this Court boldly characterized the Court of Appeals's opinion as a significant shift from existing KCRA retaliation law, to wit:

> Prior to this decision, the long established law has been that it is a violation of the retaliation statute if the employee's discrimination complaint was "a substantial motivating factor" in the discharge. *First Property Management Corp. v. Zarebidaki*, Ky. 867 S.W.2d 185 (1993) (holding that employers "are not free from liability simply because they offer proof they would have discharged [the employee] anyway, even absent the lawfully impermissible reason, so long as the jury believes the impermissible reason did in fact contribute to the discharge as one of the substantial motivating factors.").
>
> Now, however, the Court of Appeals has moved the bar far to the right, holding that even if it is proven to, and decided by, a jury that the protected activity was in fact a substantial motivating factor in the employee's discharge, it is nevertheless not unlawful retaliation where the employer also articulates any nondiscriminatory reason for the discharge. In effect, the Court of Appeals' decision now makes it *legal* in Kentucky to retaliate against an employee for complaining about discrimination so long as the employer states that there were also performance based reasons for the discharge.

Id. (emphasis original). This analysis is an egregious misstatement of the law governing employment retaliation claims, and the effect that law has on litigants' respective burdens, for a number of reasons.

- ***Zarebidaki* is not a Kentucky Civil Rights Act case at all, but rather a decision addressing a claim under KRS § 342.197.** While this Court borrowed the then-relevant "mixed motive" analysis used in *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.3d 814 (Ky. 1992), a KCRA sex discrimination case, to decide *Zarebidaki,* it expressly disclaimed that its analysis was governed by any state or federal civil rights act. *Zarebidaki*, 867 S.W.2d at 188. *Zarebidaki* has since been distinguished from *McCullough* and other Kentucky Civil Rights Act retaliation cases as a separate and distinct line of authority. *See Follett v. Gateway Regional Health Sys.*, 229 S.W.3d 925, 928-929 (Ky. App. 2007) (distinguishing burden-shifting analysis in *McCullough* with "non-civil rights wrongful discharge case[s]" like *Zarebidaki*). Thus, on a threshold level, *Zarebidaki* is not a KRS § 344.280 case, does not bind this Court here in any way, and does not supersede this Court's actual KRS § 344.280 precedent in *McCullough* and *Brooks, supra.*

- **There is no "mixed motive" theory available under KRS § 344.280 that would permit a plaintiff to advance her claim simply by showing retaliation was a "substantial motivating factor."** In *Meyers*, this Court held that a KCRA sex discrimination plaintiff could prevail on her KRS § 344.010 claim using a "mixed motive" standard similar to that established by the Supreme Court of the United States in another sex discrimination case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Meyers,* 840 S.W.2d at 823-824. Under this "mixed motive" standard, the *Meyers* Court explained, a plaintiff could prove sex discrimination was the "but for" cause of an adverse employment action if she proved discrimination was a "contributing and essential factor" in the relevant employment decision. *Id.* at 823. In other words, a "mixed

motive" plaintiff did not need to prove that unlawful discrimination was the sole reason, or "single motive," for her injury. *Id.*

In 1991, Congress amended Title VII of the Civil Rights Act of 1964 ("Title VII") in response to *Price Waterhouse* to specifically permit a plaintiff to prevail on a "mixed motive" theory if he or she could prove unlawful discrimination was a "motivating factor" in the defendant's decision. 42 U.S.C. § 2000e-2(m); *see also Mendez v. Univ. of Ky. Bd. of Trustees*, 357 S.W.2d 534, 540-544 (Ky. App. 2011) (explaining and contrasting federal, Kentucky "mixed motive" formulations with traditional "single motive" cases). In exchange for this lesser evidentiary burden, however, a "mixed motive" Title VII plaintiff could only obtain declaratory relief, injunctive relief and an award of attorney's fees. *Id., citing* 42 U.S.C. § 2000e-5(g)(2)(B).

The Kentucky General Assembly did not amend KRS Chapter 344 to mirror Congress's 1991 changes. Accordingly, several courts in Kentucky have determined that – despite Kentucky's general policy of interpreting the KCRA consistent with Title VII – two distinct "mixed motive" standards currently exist: one federal standard created by Congress's 1991 amendments to Title VII, which require only that a plaintiff prove unlawful discrimination was a "motivating factor" to the employer; and one created by *Meyers*, which requires that a plaintiff prove unlawful discrimination was a "substantial factor," "contributing and essential factor," or "essential ingredient." *See, e.g., Mendez,* 357 S.W.3d at 541; *Alexander v. Univ. of Ky.,* 2012 U.S. Dist. LEXIS 46173 at *44-46 (E.D. Ky., Mar. 28, 2012) (Wier, M.J.).

Critically, these statutes and cases only address potential "mixed motive" standards for claims of unlawful *discrimination*, and are silent as to *retaliation* claims,

which arise under wholly different sections of both Title VII and the KCRA. *Compare* 42 U.S.C. § 2000e-2(m) and KRS § 344.040 (federal and state anti-discrimination provisions) *with* 42 U.S.C. § 2000e-3(a) and KRS § 344.280 (federal and state anti-retaliation provisions). This distinction was highlighted in *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013), in which the Supreme Court of the United States held that Title VII's anti-retaliation section did not permit "mixed motive" claims. *Id.* at 2534. There, the Supreme Court found that Title VII's anti-retaliation language requiring an individual to prove that he was retaliated against by his employer "because he has [engaged in protected activity]" included a stricter causation standard than Title VII's anti-discrimination provision, which requires only that an employee prove a protected classification was a "motivating factor" towards an adverse employment action. *Id.* at 2528. Specifically, the Supreme Court held that the term "because" used in Title VII's anti-retaliation section required a showing of "but for" causation by a plaintiff. *Id.* at 2526-28. "But for" causation, in turn, requires a plaintiff to show that unlawful retaliation was the single motive for the adverse employment action. *Id.* Thus, given the text, structure, and history of Title VII's anti-retaliation section, a "mixed motive" theory conceding both lawful and unlawful motivations under that section was precluded as a matter of law.

Kentucky courts interpret unlawful retaliation under the KCRA consistent with the interpretation of unlawful retaliation under federal law. *Brooks*, 132 S.W.3d at 802. Accordingly, the holding of *Nassar* applies with equal force to KRS § 344.280 retaliation claims as it does to Title VII retaliation claims. *Nassar*'s holding, moreover, is consistent with the analysis of other Kentucky state and federal courts that have independently

examined whether KRS § 344.280 permits a "mixed motive" theory. *See* **Appx. C**, *Bach v. Crews*, Case No. 201-CA-000331-MR at 8-11 (Ky. App., July 8, 2011) (unpublished) (discussing pre-*Nassar* federal appellate decisions and this Court's decisions in *McCullough* and *Brooks* in holding that mixed-motive standard was unavailable for KCRA retaliation claims) (discretionary review denied April 18, 2012); *Alexander,* 2012 U.S. Dist. LEXIS 46173 at *46 (citing *Bach, supra*). Finally, KRS § 344.280 (and, for that matter, KRS § 344.040) contains the same dispositive statutory language ("because of") as that scrutinized in 42 U.S.C. § 2000e-3(a), Title VII's anti-retaliation section, further encouraging a harmonious interpretation of the two statutes.

For all these reasons, the "mixed motive," "substantial motivating factor" standard introduced by *Meyers* and incorporated into *Zarebidaki* is inapposite here. The "single motive" framework established by this Court in *McCullough* and used by the Court of Appeals below was, and is, the correct analysis – just as Banker herself had recognized in the courts below.

- **The Court of Appeals's opinion has not "moved the bar" on KCRA retaliation claims.** Viewed through the correct "single motive" *McDonnell Douglas*-based framework, Banker's argument that the Court of Appeals changed the law is meritless. Under *McDonnell Douglas*, an employee has always had the initial burden of establishing a prima facie case. If the employee succeeds in creating an initial presumption of retaliation through this prima facie case, the employer must then simply articulate – not prove – a legitimate, non-retaliatory reason for the employment action, which destroys the initial prima facie presumption. At that point, the burden of proof and persuasion shifts back to the plaintiff to prove the employer's stated reason is a pretext,

and that the employee was the victim of intentional retaliation. If the employee cannot produce substantial evidence that the employer's reason (performance based or otherwise) is unworthy of credence, she cannot advance her claims as a matter of law.

This is exactly the case here. Assuming, *arguendo*, that Banker had proven a prima facie case of retaliation, her arguments here improperly try to convert ULAA's intermediate burden of production into an ultimate burden of persuasion. It is not, however, ULAA's task to prove its legitimate non-retaliatory reasons for firing Mary Banker, it is Banker's task to disprove ULAA's reasons. Thus, the "new legal standards" Banker claims will result if the Court of Appeals is affirmed (Banker Brief, p. 10) are no different than those used in Kentucky and beyond for decades. If an employer articulates a performance-based reason for its decision, and the employee presents no evidence of pretext, dismissal is mandatory. Similarly, if an employee does not prove her employer's stated reason is pretextual and does not provide a substantial evidentiary basis upon which a jury can conclude unlawful retaliation, the employee's claim cannot be submitted to the jury. *Williams*, 184 S.W.3d at 497-500.

- **Banker never cited or otherwise raised *Zarebidaki* or a "mixed motive" retaliation claim in the trial court or Court of Appeals.** These arguments are being raised for the first time to this Court. No reference to a "mixed motive" retaliation claim was raised in the complaint, in discovery, in summary judgment briefing, at trial, or before the Court of Appeals. Indeed, Banker sought (and was initially awarded) substantial money damages that are inconsistent with the limited damages available under a "mixed motive" theory. These acts and omissions preclude the consideration of a "mixed motive" claim here. *See, e.g., Murray v. E. Ky. Univ.*, 328 S.W.3d 679, 681 (Ky.

App. 2009), *Spees v. James Marine, Inc.*, 617 F.3d 380, 390 (6th Cir. 2010), *Alexander*, 2012 U.S. Dist. LEXIS 46173 at *45-46 (plaintiff waives mixed-motive claim if sufficient notice not given in trial court, inconsistent remedies sought).

Banker's cynical, thirteenth-hour "flip-flops" make it very clear that her trial presentation failed to establish proof sufficient to survive the *McDonnell-Douglas/McCullough* standards. As the next section discusses at length, Banker did not prove a prima facie case of retaliation, and failed to introduce any proof of pretext. The Court of Appeals properly reversed the trial court's judgment and orders.

IV. THE COURT OF APPEALS PROPERLY APPLIED THE *MCDONNELL DOUGLAS/MCCULLOUGH* BURDEN-SHIFTING TEST TO THE PROOF INTRODUCED AT TRIAL.

A. The Court of Appeals Correctly Held That Banker Failed to Offer Any Evidence Showing a "Causal Connection" Between Her Protected Activity and the Decision to End Her Employment.

First, because Banker failed to present any evidence establishing a "causal connection" between her April 22, 2008 human resources complaint and ULAA's April 16, 2008 decision to not renew her contract, the Court of Appeals correctly held that she did not prove even a preliminary prima facie case of retaliation. In *McCullough*, *supra*, this Court elaborated on this mandatory causation element as follows:

> A causal connection can be established through either direct or circumstantial evidence. [...] Circumstantial evidence of a causal connection is evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. In most cases, this requires proof that (1) the decision-maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action.

Id. at 135 (quotations omitted) (*citing Nguyen v. City of Cleveland*, 229 F.3d 559, 565 (6th Cir. 2000), and *Clark Co. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001)). Critically, in *Breeden*, *supra*, the Supreme Court of the United States held that no causal

connection could be inferred in a Title VII retaliation case where an employer contemplated the challenged employment action before the employee's protected activity, and then followed through with that decision after the protected activity:

> The latter [fact that an adverse employment action occurred one month after the decisionmaker learned of the plaintiff's protected activity] is immaterial in light of the fact that petitioner concededly was contemplating the [action] before it learned of the [protected activity]. Employers need not suspend previously planned [actions] upon discovery that a [protected activity has been taken], and their proceeding along lines previously contemplated, though not definitely determined, is no evidence whatever of causality.

Id. at 272 (underline added). Since *Breeden* was decided in 2001, this rule has been uniformly applied throughout the federal courts, as well as many state appellate courts. *See, e.g., Reynolds v. Federal Express Corp.*, 544 Fed. Appx. 611, 615 (6th Cir. 2013); *Schoppman v. Univ. of S. Fla. Bd. of Trustees*, 519 Fed. Appx. 549, 553 (11th Cir. 2013); *Munoz v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de Puerto Rico*, 671 F.3d 49, 56 (1st Cir. 2012); *Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668, 675-677 (7th Cir. 2011); *Rene v. Lidestri Foods, Inc.*, 2010 WL 4807050 at *9 (D.N.J., Nov. 17, 2010); *Walton-Horton v. Hyundai of Alabama*, 2010 WL 4121303 at *4 (11th Cir., Oct. 21, 2010); *Reynolds v. Extendicare Health Servs., Inc.*, 257 Fed. Appx. 914, 919-20 (6th Cir. 2007); *Weston-Brown v. Bank of America Corp.*, 167 Fed. Appx. 76, 81-82 (11th Cir. 2006); *Kasper v. Federated Mut. Ins. Co.*, 425 F.3d 496, 504 (8th Cir. 2005); *Bates v. Variable Annuity Life Ins. Co.*, 200 F.Supp.2d 1375, 1383 (N.D. Ga. 2002) (federal decisions finding no causal connection where adverse employment action was initially decided or considered by employer before employee's protected activity); *see also Mole v. Univ. of Mass.*, 814 N.E.2d 329, 340 (Mass. 2004); *Charalambakis v. Asbury College*, 2014 Ky. App. LEXIS 16 at *23 (Ky. App., Jan. 31, 2014); *Melman v. Montefiore Med. Ctr.*, 2012 N.Y. App. Div. LEXIS 4076 at *39-40 (N.Y. App. Div., May

29, 2012); *Martinez v. Temple-Inland Forest Prods-Corp.*, 2007 Tex. App. LEXIS 5606 at *13 (Tex. App., July 18, 2007); *Thompson v. Merriman CCRC, Inc.*, 2006 Ohio App. LEXIS 5958 at *14 (Ohio Ct. App., Nov. 15, 2006); *Cannon v. Seattle City Light*, 2006 Wash. App. LEXIS 1633 at *25 (Wash. Ct. App., July 31, 2006) (state appellate decisions affirming dismissal where adverse employment action was initially decided or considered by employer before employee's protected activity).

Banker's theory of causation at trial was based solely on the temporal proximity between her April 22, 2008 complaint to the University of Louisville's human resources department and her May 15, 2008 meeting with Coach Mann, at which she was notified that her contract was not being renewed. In fact, on May 16, 2008, the day after this meeting, Banker sent an email to Mann and Hermann concluding that "[w]ith the timing of our meeting there is no other conclusion but that I am being let go in retaliation for the recent [HR] investigation." *See also* VR 9/14/10 at 10:19:58 – 10:20:20 (Counsel: "How long after your April 22 complaint were you fired?" Banker: "Well, I guess it'd be three weeks, May 15, Coach Mann had a meeting with me, and he told me it wasn't a good fit, and he wasn't going to renew my contract."). At no point, before filing her motion for discretionary review, did Banker ever reference other, additional alleged "protected activities" upon which her retaliatory discharge claim was based.[6]

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[6] On this point, Banker has changed her story yet again, claiming for the first time here that her discharge was based on other, earlier instances of "protected activity." (Banker Brief at 8-9). Banker never once characterized these earlier conversations as part of the "statutorily protected activity" at issue here. In fact, the temporal proximity argument Banker has relied upon throughout this case is wholly dependent upon a single April 22, 2008 complaint. *See, e.g.*, **Appx. A,** Banker's Response to Defs.' M. for Summ. J. at 15-17 (only specifying April 22, 2008 complaint as protected activity on which discharge allegedly based). Having failed to present to the jury, to the Circuit Court, or to the Court of Appeals her new characterization of "statutorily protected activity," Banker cannot

Banker's trial theory, however, was fatally undermined by the logic embraced in *Breeden, supra*, and the undisputed evidence showing that ULAA contemplated (if not conclusively decided) Banker's non-renewal almost a week before her April 22 complaint. Banker introduced no evidence of any kind to dispute the substance of this meeting, or its contemplated course of action. Indeed, Banker admitted on the stand that she had no personal knowledge of when her non-renewal decision was made, or what was said at any meetings about her employment. VR 9/14/10 at 11:27:30-45.

At the close of Banker's proof, ULAA moved for a directed verdict on these grounds.[7] The Circuit Court denied the motion, referring only to Plaintiff's Exhibit 8, a May 6, 2008 email from Hermann to University human resources personnel. In light of the Supreme Court's holding in *Breeden*, and the numerous cases adopting and applying *Breeden*, the Court of Appeals correctly held that the Circuit Court's analysis was erroneous. To obtain a directed verdict on causation grounds, ULAA was not obligated to show that it had made a final decision as to Banker's non-renewal before her April 22, 2008 complaint; it only had to show that it was *contemplating* the non-renewal. *See Breeden*, 532 U.S. at 272 ("[P]roceeding along lines previously contemplated, though not definitely determined, is no evidence whatever of causality.") (underline added).

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now present it to this Court. "An appellant is not 'permitted to feed one can of worms to the trial judge and another to the appellate court.'" *TECO Mech. Contr.*, 366 S.W.3d at 397, n.15 (citation and quotation omitted). In any event, these informal gripes about (1) uncomfortable language used around and by (but not at) Banker and (2) sporadic workplace communication issues do not constitute "statutorily protected activity" as a matter of law. *See, e.g., Breeden*, 532 U.S. at 270-71 (where incidents recounted by employee would not reasonably constitute hostile work environment in violation of Title VII, complaint not considered statutorily protected activity).

[7] ULAA renewed this motion at the close of all proof, and in its other post-trial filings.

Likewise, the Circuit Court's rationale for denying ULAA's motion for judgment n.o.v was erroneous as well. First, the jury had no evidence before it reflecting that Mann and Hermann's April 16, 2008 conversation did not happen, or that Banker's likely discharge had not been discussed.[8] Accordingly, there was no basis on which the jury could have disbelieved ULAA. Second, the decision to assign the investigation of Banker's April 22, 2008 complaint to Hermann was made by Durbin and her supervisor – University human resources staff who had no knowledge of, or connection to, ULAA's decision to discharge Banker. Thus, this assignment was not evidence whatsoever of retaliation. Third, Hermann's alleged remarks voicing displeasure about Banker complaining outside of ULAA – purportedly made well after her April 16, 2008 meeting with Mann - still does not change the effect of the *Breeden* rule here, especially where Banker clearly cited the timing of the decision as her only theory of causation. The Circuit Court was unreasonably concerned about a potential weakness with *Breeden*'s approach (employers inventing pre-complaint "decisions") without crediting the Supreme Court's unanimous desire to promulgate a rule of law that would address a much more likely scenario – an employee filing an omnibus complaint on the eve of performance evaluations to insulate herself from a predictably adverse action. The Court of Appeals properly recognized and faithfully followed these policy considerations. *See Banker,*

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[8] Banker's accusation that ULAA "deliberately withheld" documentation of this meeting in discovery is both off the mark and inappropriate. Ron Mann testified at his deposition about this April 16, 2008 meeting some eight months before trial (*see* Mann Deposition at 26:14-17); Banker made no effort to serve follow-up written discovery requests. ULAA argued in its summary judgment memorandum that, based on this April 16, 2008 meeting, Banker could not show causation necessary to prove a prima facie case. Banker ignored the argument altogether. *Compare* ULAA Mem. in Support of M. for Summ. J. at 24 *with* **Appx. A,** Banker Resp. to ULAA M. for Summ. J. at 15-17. Banker made no pretrial motions on the matter. Only when the jury was seated and present did Banker erroneously allege – in open court – that this documentation had been "withheld."

2013 Ky. App. Unpub. LEXIS 897 at *12 ("The policy reasons behind the decision in *Breeden* include that an employer should not be put at the mercy of an underperforming or unqualified employee, who could see the writing on the wall and make a complaint so as to be put in a protected position against termination. It would be wholly unjust to put employers in such situations.").

Accordingly, the fact that ULAA followed through with its "likely" non-renewal decision three weeks after Banker made her human resources complaint cannot support Banker's theory of causation. The Court of Appeals correctly concluded that Banker did not prove a *prima facie* showing of retaliation.

B. The Court of Appeals Correctly Held In the Alternative that Banker Failed to Offer Any Proof Showing ULAA's Legitimate Reasons for Ending Her Employment Were False and a Pretext for Retaliation.

Even if Banker had offered evidence to support a prima facie case of KRS § 344.280 retaliation, the Court of Appeals' opinion should still be affirmed, as it correctly held that Banker failed to introduce any evidence showing ULAA's legitimate, undisputed business reasons for declining to renew her contract were a pretext for unlawful retaliation. Banker submitted no proof of "cold hard facts" that would permit a rational jury to conclude that ULAA had unlawfully retaliated against her because of her April 22, 2008 human resources complaint. *See Ky. Center for the Arts v. Handley,* 827 S.W.2d 697, 700-01 (Ky. App. 1991); *McCullough,* 123 S.W.3d at 137 (stating that a *prima facie* case is only "half the battle. Proof of pretext is the other."). This was the basis for ULAA's unsuccessful motion for directed verdict at the close of proof.

At trial, ULAA articulated (and proved through overwhelming evidence) a legitimate, non-retaliatory reason for its decision to not renew Banker's contract, namely: her poor performance as a coach and a recruiter. Thus, ULAA met its burden of

production under the *McDonnell Douglas* framework. *Williams*, 184 S.W.3d at 497. At that point, Banker was left with the burden of providing, through sufficient evidence, a basis upon which a reasonable jury could find "that the employer's stated reason for the termination was merely a pretext, masking the discriminatory motive. In other words, [Banker was] required to produce sufficient evidence from which the jury could reasonably reject the employer's explanation." *Id.* A *prima facie* case plus substantial proof of pretext is mandatory to survive a motion for directed verdict or judgment n.o.v.

Here, however, Banker failed to prove her *prima facie* case, and presented no evidence of pretext; accordingly, the Court of Appeals properly concluded there was insufficient evidence to permit a jury to conclude unlawful retaliation took place. *See id.* at 498-500. For those detailed reasons set forth at length above, *supra*, ULAA had no reason whatsoever to bring Banker back for a second academic year. ULAA's track program was and is a top Division I program, and – as Banker herself confirmed – the program had no obligation to retain a coach who did not produce the expected results, and undermined the future of the track and field team. Moreover, "a plaintiff's own opinions about her work performance or qualifications do not sufficiently cast doubt on the legitimacy of her employer's reasons for its employment actions." *Woods v. Western Ky. Univ.*, 303 S.W.3d 484, 488 (Ky. App. 2009) (quotations and citation omitted).

Banker criticizes the lack of paperwork or progressive discipline surrounding her performance and non-renewal (*see, e.g.,* Banker Brief at 4-5), but there was no proof in the record that ULAA policies required any such paperwork or progressive discipline, or that Mann had documented other track coaches' shortcomings, or given "write-ups" to other coaches, but not Banker. Banker is, essentially, trying to manufacture a new, more

stringent administrative standard than that used with any track coach, so she can criticize Mann for not meeting this new, imaginary standard. Banker's allegation might reflect that ULAA could improve its recordkeeping procedures as to all track coaches, but it does not prove that one employee – Mary Banker – was intentionally retaliated against, or that ULAA's concerns about Banker had been suddenly invented. *See also Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 826-827 (7th Cir. 2005) (employee citing "lack of documentation" at the pretext stage impermissibly attempts to shift ultimate burden of proof onto employer). In a results-oriented profession governed by objective measures (time, distance, point totals, quality and number of recruits, etc.), Banker's clear lack of success recruiting, coaching or even retaining athletes constituted conclusive evidence of performance shortcomings that needed no special elaboration. This is undoubtedly why Banker failed to ask Mann a single question about why her contract was not renewed – it was obvious to both parties. (VR 9/14/10 at 3:26:01 - 18). *See also Hague*, 436 F.3d at 827-828 (fact that discharged employees told they did not "fit," without explanation, did not constitute evidence of pretext).

In sum, Banker simply provided no proof to support a jury finding that (1) ULAA fabricated the avalanche of evidence supporting Banker's non-renewal for poor performance, and (2) the real reason for ULAA's non-renewal decision was to retaliate against her for filing a human resources complaint – when that non-renewal decision was contemplated as "likely" by ULAA six days before the human resources complaint was made. Indeed, Banker declined to offer any rebuttal testimony at all after the close of ULAA's case in chief. Accordingly, the Court of Appeals's opinion should be affirmed on this basis as well.

V. BANKER FAILED TO PRESENT PROOF THAT SHE TRIED TO MITIGATE HER DAMAGES AND THUS CANNOT RECOVER LOST WAGES.

Alternatively, if this Court decides to reinstate the trial court's judgment, it should modify that judgment to strike the jury's $71,875 award of lost wages, as Banker failed to present any evidence that she attempted to adequately mitigate her damages between her discharge and trial. It is well-settled that a plaintiff seeking damages for lost wages due to wrongful termination must present sufficient evidence of specific facts demonstrating she exercised reasonable diligence to secure comparable employment after being discharged by the defendant employer; otherwise, she is only entitled to nominal damages. *Newport Dairy v. Shackelford*, 88 S.W.2d 940, 942 (Ky. 1935); *Louisville & N. R. Co. v. Wells*, 160 S.W.2d 16, 18-19 (Ky. 1942); *Comm. v. Ratliff*, 497 S.W.2d 435, 435 (Ky. 1973); *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461-62 (Ky. 1990); *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 918 (Ky. App. 2006); *Cherry v. Augustus*, 245 S.W.3d 766, 778 (Ky. App. 2006); *Foster v. Koger*, 2009 WL 1347400 at *2 (Ky. App., May 15, 2009). Additionally, a plaintiff employee may only recover lost wages for those periods of time for which she affirmatively proves that she was ready, willing, and able to work, and was physically able to perform her prior job duties. *Dollar General*, 214 S.W.3d at 917, *Louisville-Jefferson Cty. Metro Gov't v. Martin*, 2009 WL 1636270 at *12-13 (Ky. App. June 12, 2009) (Kentucky Civil Rights Act case).

Here, the trial record is devoid of <u>any</u> evidence, much less evidence supporting the specific facts required by *Shackelford* and other Kentucky cases, bearing on Banker's efforts to secure employment after her discharge by ULAA. Likewise, the trial record contains no evidence reflecting that Banker was ready, willing, and able to work, and was

physically able to work as a coach, for any time period between her discharge and trial. The basis for any award of lost wages – much less the full $71,875 actually awarded – is entirely speculative, and would provide Banker with a windfall exceeding the "actual damages" permitted by KRS § 344.450.

The Circuit Court's order denying ULAA's motion on this point erroneously eliminated Banker's evidentiary burden altogether, finding that by initiating litigation voluntarily, Banker had affixed to herself a "virtual scarlet letter" that excused her lack of proof. (12/10/10 Cons. Op. and Order, p. 3). No Kentucky case law supports such an "inferred futility" exception to Banker's duty to prove mitigation, and for good reason: if that was the law, every Kentucky Civil Rights Act plaintiff would simply throw their hands up and claim, without any proof, that the lawsuit they voluntarily pursued made them unemployable – instead of actually proving their inability to find work through admissible evidence. The Circuit Court's exception would easily swallow the rule. Accordingly, any jury award of lost wages for Banker's retaliation claim should be stricken as unsupported by the evidence.

VI. BANKER FAILED TO PRESENT SUFFICIENT PROOF TO SUPPORT A $300,000 AWARD OF EMOTIONAL DISTRESS DAMAGES.

Alternatively, if the Court decides to reinstate the trial court's judgment, it should order a new trial on the issue of Banker's mental and emotional distress damages. Banker gave only brief, conclusory testimony about the effects of her discharge, and then Banker's mother testified on the stand that even these alleged effects predated her discharge. These snippets of testimony cannot support a $300,000 mental and emotional distress award under Kentucky law. The jury's determination bore no relation to the proof. *See, e.g., Motorist Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1994); *Ky.*

Comm. on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981) (emotional distress award must be supported by substantial evidence of an actual emotional injury). Other recent KCRA cases support this conclusion:

- In *Flowitt v. Ashland Hosp. Corp.*, 2007 WL 1519392 (Ky. App., May 25, 2007), the Court of Appeals reversed an award of $500,000 in emotional distress damages where "[t]he evidence of emotional distress consisted of brief remarks during [the plaintiff's] testimony and a comment in [a doctor's] report." *Id.* at *9. There, the Court of Appeals found that "there was no evidence of an actual injury - of any disruption of [the plaintiff's] affairs or personality flowing from the breach of contract of [the employer's] wrongful acts – which would support the substantial emotional distress damages award in this case." *Id.* at *10. Similarly, here Banker only offered brief testimony that she felt "depressed" and "stressed" and lost weight – and Banker's mother testified that even these alleged effects all took place before her discharge – yet she received a similarly unsupported substantial award. In fact, the evidence here is even weaker than that in *Flowitt*, which at least featured some objective, medical evidence of emotional distress.

- In *Childers Oil Co. v. Adkins*, 256 S.W.3d 19, 27-29 (Ky. 2008) this Court scrutinized a jury's total award of $50,000 in actual damages (including, but not limited to, damages for emotional distress) in a KCRA case. There, like here, the evidence supporting the plaintiff's claim for emotional distress was "not strong" and consisted only of the plaintiff's testimony. *Id.* at 28. Nevertheless, this Court upheld that award as "not so disproportionate to the evidence" as to warrant a new trial. *Id.* at 29. Here, on virtually identical evidence, the jury awarded six times the amount upheld in *Adkins*,

strongly suggesting its award was, in fact, disproportionate to the evidence. In *Adkins*, moreover, this Court commented that it was unable to discern from the jury's "lump sum" award of compensatory damages how much the jury had intended to allocate to emotional damages. This ambiguity, which supported affirmance in *Adkins*, is not present here.

- In *Core Medical, LLC v. Schroeder*, 2010 WL 2867820 (Ky. App., July 23, 2010), the Court of Appeals upheld a jury's total award of $125,000 in actual damages – of which emotional distress damages were only one component – where (1) the plaintiff's dismissal took place in front of other employees; (2) supporting testimony was provided by the plaintiff as well as the plaintiff's husband, mother, and neighbor; (3) the plaintiff testified that the joy of her child's birth was overshadowed by her termination, which she claimed was motivated by pregnancy discrimination; and (4) the plaintiff testified that the plaintiff could not complete ordinary, daily tasks around her home. *Id.* at *6-7. Banker did not put on evidence of anything even approaching these humiliating and physically limiting circumstances, yet she was awarded $175,000 more (over double) in emotional distress damages than the plaintiff in *Schroeder*.

Emotional distress damages are available under the KCRA, but those damages must have some nexus with the evidence and some basis in reality. These cases confirm that the jury's $300,000 award had no such nexus, and was extremely excessive under law. The Circuit Court's analysis on this point was erroneous, and should be reversed in favor of a new trial.

VII. THE CIRCUIT COURT'S AWARD OF ATTORNEY'S FEES WAS UNREASONABLE.

Alternatively, if this Court decides to reinstate the trial court's judgment, it should set aside the Circuit Court's decision to award Banker's counsel $149,325 in "prevailing plaintiff" fees as unreasonable and unsupported by the evidence. First, Banker failed to satisfy her burden of proving her requested attorney's fees were "reasonable," as defined exclusively by the "lodestar" method established for KCRA claims in *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814 (Ky. 1992). Specifically, the documentation of counsel's hours spent litigating this case was either non-existent or plainly not credible, and clearly contradicted the initial representations offered by counsel. The Circuit Court erroneously failed to consider in any way ULAA's documentation, and simply accepted Banker's counsel's representations at face value without scrutinizing the requisite proof. 678.75 hours would perhaps be reasonable to use in a "lodestar" calculation, but only if the evidence reflected that those hours were all actually worked. *See Hill v. Ky. Lottery Corp.*, 327 S.W.3d 417, 429 (Ky. 2010) (trial court reversed because it awarded fees "with no consideration of the actual time and effort expended" and not engaging in a "true effort to place value on the services rendered.") (underline added). Here, the Circuit Court did not expend any effort determining the accurate, actual time Cassis spent litigating Banker's successful claim; accordingly, its use of hypothetical hours in its "lodestar" determination was in error.

Second, the Circuit Court erred when it found that ULAA could not contest Banker's counsel's fee claim without disclosing its own counsel's hours. The concept of "fee parity" between parties in a fee award context is dubious at best; quite simply, defendants often have more work to do, as they have to successfully defend against every

claim, and plaintiffs need only be successful on one. A complaint that takes forty-five minutes to draft can require weeks of discovery and dispositive motion briefing to dismiss. Accordingly, the amount of time Defendants spent contesting Banker's "shotgun" complaint is irrelevant to the amount of time Banker spent prosecuting her retaliatory discharge claim, and its consideration by the Circuit Court was clearly improper.

Third, the Circuit Court's determination that its fee award was reasonable because it approximated 40% of the jury's total award was erroneous. The jury's total award was excessive to begin with, and is not a reliable figure upon which to premise any fee award. The Circuit Court's reliance on a fixed ratio as a guide to "reasonableness," moreover, violates *Hill*'s command not to "adopt some arbitrary proportionate relationship between the amount of the attorney fees and the amount awarded" when arriving at, or confirming, a reasonable fee amount. 327 S.W.3d at 429.

Fourth, the Circuit Court's refusal to apply any downward amendment to the "lodestar" figure to account for Defendant Jurich's outright dismissal was erroneous. Banker's seven (7) claims against Jurich were imprudently brought and completely unsuccessful. Counsel should not be rewarded or compensated for those efforts spent pursuing his client's failed claims against Jurich.

CONCLUSION

The Court of Appeals applied the correct legal standards to an accurate account of the evidence presented at trial. Mary Banker was fired for poor performance, and no reasonable jury could have found otherwise on the proof before it. For these reasons,

and all those other reasons contained in the record, ULAA respectfully requests that this Court affirm the opinion of the Court of Appeals.

Respectfully submitted,

Craig C. Dilger
Jeffrey A. Calabrese
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
Counsel for Appellee/Cross-Appellant